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Diversity Jurisdiction - Limited Partnerships

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DIVERSITY JURISDICTION—LIMITED PARTNERSHIPS—The United States Supreme Court held that, for purposes of diversity jurisdiction, the citizenship of each member of a limited partnership, both limited and general partners, must be considered.

Carden v Arkoma Associates, ____ US ____, 110 S Ct 1015 (1990).

Arkoma Associates (hereinafter, "Arkoma") was a limited partnership organized under Arizona law.¹ Two of Arkoma's general partners were citizens of Arizona, and two others were citizens of Oklahoma.² The membership of Arkoma also contained one limited partner who was a citizen of Louisiana.³

An agreement was executed between Arkoma and MaGee Drilling Company (hereinafter, "MDC"), a Texas corporation, whereby Arkoma leased two drilling rigs to MDC.⁴ C. Tom Carden and Leonard L. Limes, both citizens of Louisiana,⁵ personally guaranteed MDC's obligations under the lease.⁶ MDC failed to make its payments under the lease and Arkoma accelerated the payments.⁷

Arkoma brought suit against Carden and Limes as MDC's guarantors in the United States District Court for the Eastern District of Louisiana.⁸ Federal jurisdiction was based on diversity of citizenship.⁹ The defendants, Carden and Limes, moved the court to

1. *Carden v Arkoma Associates*, ____ US ____, 110 S Ct 1015, 1016 (1990). On appeal from the district court's judgment in favor of Arkoma, appellants maintained that the district court had erroneously found Arkoma to be a limited partnership. Although not all aspects of Arizona law had been complied with, the district court found that Arkoma had "in good faith, substantially complied with the provisions of the statute, and therefore [was] a valid limited partnership under Arizona law." *Arkoma Associates v Carden*, 874 F2d 226, 228-29 (5th Cir 1988). The Fifth Circuit found no error of fact or law in the finding of the district court. *Arkoma Associates*, 874 F2d at 229.

2. *Id.* at 228.

3. *Id.*

4. *Id.* at 227-28.

5. *Carden*, 110 S Ct at 1016.

6. *Arkoma Associates*, 874 F2d at 228.

7. *Id.* Upon notification by MDC that it could not meet its obligations to creditors, MDC tendered, and Arkoma accepted, physical possession of the rigs but reserved its rights under the lease. *Id.*

8. *Carden*, 110 S Ct at 1016. Although MDC's president, Don MaGee, signed the lease in question, he was not made a party-defendant in the suit. *Arkoma Associates*, 874 F2d at 228, n.1.

9. *Carden*, 110 S Ct at 1016. The relevant portions of the diversity jurisdiction statute, codified in 28 USC § 1332, are as follows:

dismiss the action for lack of diversity jurisdiction on the ground that their citizenship was the same as that of Arkoma's limited partner.¹⁰ The district court denied the motion but certified the jurisdictional question for interlocutory appeal, which the Fifth Circuit declined.¹¹ MDC intervened on behalf of the original defendants and collectively counterclaimed against Arkoma.¹² Judgment was awarded to Arkoma, and the defendants' counterclaim and intervention were dismissed.¹³ Carden, Limes, and MDC appealed, raising the issue of whether Arkoma had properly invoked diversity jurisdiction.¹⁴

The United States Court of Appeals for the Fifth Circuit, finding no error in the district court's determination that Arkoma was in fact a limited partnership,¹⁵ affirmed the lower court's finding that the requirements of diversity jurisdiction were satisfied.¹⁶ Citing *Navarro Savings Association v Lee*¹⁷ and *Mesa Operating Limited Partnership v Louisiana Intrastate Gas Corporation*,¹⁸ the Fifth

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

* * *

(c) For the purposes of this section . . . (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .

28 USC § 1332 (West 1988).

10. *Arkoma Associates*, 874 F2d at 228.

11. *Id.*

12. *Id.* The counterclaim alleged violations of the Texas Deceptive Trade Practices Act resulting from alleged misrepresentations made by Arkoma regarding its drilling rigs. *Id.*

13. *Id.* Arkoma's judgment amounted to \$467,806.25 plus interest and attorney's fees. *Id.*

14. *Id.* Other issues raised on appeal involved the district court's allegedly erroneous findings that Arkoma had not acted fraudulently, that Arkoma had been entitled to repossess its drilling rigs and at the same time accelerate the rent payments, and that the defendants' counterclaim was unsubstantiated. The Fifth Circuit affirmed each of these findings. *Id.* at 230.

15. See note 1.

16. *Arkoma Associates*, 874 F2d at 229.

17. 446 US 458 (1980). In *Navarro*, the Supreme Court held that the citizenship of the trustees of an express business trust, rather than that of the beneficiaries, was determinative of diversity jurisdiction. The Court found that because the trustees held legal title of the trust, managed the assets, and controlled the litigation, the trustees were the "real parties to the controversy." *Navarro*, 446 US at 465. See notes 131-47 and accompanying text for a more detailed discussion of *Navarro*.

18. 797 F2d 238 (5th Cir 1986). In *Mesa*, the Fifth Circuit applied the reasoning in *Navarro* to a situation involving a limited partnership. Concluding that the general partners

Circuit held that the citizenship of the general partners determined the citizenship of the partnership.¹⁹

On certiorari to the United States Supreme Court, the sole issue to be decided was whether the citizenship of limited partners must be considered for the purpose of determining whether diversity jurisdiction exists.²⁰

The Court²¹ first stated that, since its enactment, the diversity statute²² has been interpreted to require "complete diversity" of citizenship."²³ The Court began its analysis by asking two questions to determine whether the district court's finding that diversity jurisdiction existed was correct: (1) whether "a limited partnership may be considered in its own right a 'citizen' of the State that created it, or (2) [whether] a federal court must look to the citizenship of only its general, but not its limited, partners to determine whether there is complete diversity of citizenship."²⁴

Addressing the first question, the Court recognized the "firmly established" rule that corporations are deemed "citizens" of their state of incorporation.²⁵ The Court emphasized that it had repeatedly refused to extend that treatment to other entities for purposes of the diversity statute.²⁶

were "the real parties to the controversy," the court held that only their citizenship was to be considered for diversity jurisdiction purposes. *Mesa*, 797 F2d at 243.

19. *Arkoma Associates*, 874 F2d at 228. This writer is ignorant of the reason why the Fifth Circuit couched its holding in the terms of a partnership possessing "citizenship." Unlike corporations, long deemed to be "citizens" (see notes 75-80 and accompanying text), partnerships have never authoritatively been deemed "citizens" and so this writer cannot understand how a partnership can possess "citizenship." The same is true regarding business trusts: they have never authoritatively been deemed "citizens." See note 134 and accompanying text.

20. *Carden*, 110 S Ct at 1016. *Arkoma* also urged the Supreme Court to affirm the judgment below as against MDC, asserting that no doubt existed as to those parties' diverse citizenship. The Court refused to do so in the first instance, because that point was not raised with the appellate court below. *Id* at 1022.

21. The majority opinion was written by Justice Scalia, in which Chief Justice Rehnquist, and Justices White, Stevens, and Kennedy joined.

22. See note 9 for relevant portions of the diversity statute.

23. *Carden*, 110 S Ct at 1017 (citing *Strawbridge v Curtiss*, 3 Cranch 267, 2 L Ed 435 (1806)). *Strawbridge* is discussed further at notes 70-74 and accompanying text.

24. *Carden*, 110 S Ct at 1017.

25. *Id* at 1018.

26. *Id*. As examples, the Court cited *Chapman v Barney*, 129 US 677 (1889), *Great Southern Fire Proof Hotel Co. v Jones*, 177 US 449 (1900), and *United Steelworkers of America, AFL-CIO v R.H. Bouligny, Inc.*, 382 US 145 (1965).

None of these cases involved a limited partnership: *Chapman* involved an unincorporated joint-stock company; *Great Southern* involved a limited partnership association; and *Bouligny* involved an unincorporated labor union.

Particular relevant excerpts from the Court's opinions in these cases are quoted in

The Court conceded that it made an exception to the rule in *Puerto Rico v Russell & Co.*,²⁷ where the Court treated a *sociedad en comandita* as a citizen of Puerto Rico to determine federal jurisdiction.²⁸ The Court, however, distinguished *Russell* as a peculiar situation involving an "an exotic creation of the civil law" and its relationship to "a federal scheme which knew it not."²⁹

The Court then addressed their decision in *Navarro*,³⁰ which Arkoma claimed applied to the present situation.³¹ The Court stated that *Navarro* contained an issue entirely different from that presented in *Carden*, and thus did not apply.³² The situation presented in *Navarro* involved natural persons who were undoubtedly citizens, and involved the question of which of those citizens

Carden. From *Chapman*, the Court quotes: "But the express company [unincorporated joint-stock company] cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation.'" *Carden v Arkoma Associates*, 110 S Ct at 1018 (quoting *Chapman*, 129 US at 682 (emphasis in original)).

Regarding its *Great Southern* opinion, the Court states: "[W]e held that a 'limited partnership association'—although possessing 'some of the characteristics of a corporation' and deemed a 'citizen' by the law creating it—may not be deemed a 'citizen' under the jurisdictional rule established for corporations." *Carden*, 110 S Ct at 1018 (quoting *Great Southern*, 177 US at 456).

Although the Supreme Court itself has never termed it as such, the incorporated/unincorporated dichotomy established in these three cases has become known as the "bright-line" test in law review commentary and circuit court cases.

These cases are discussed in greater detail at notes 89-108 and 117-30 and accompanying text.

27. 288 US 476 (1933).

28. *Carden*, 110 S Ct at 1018. A *sociedad en comandita* is an association organized under the laws of Puerto Rico. *Russell*, 288 US at 477. It differs from a limited partnership in that, under the law which created it, the *sociedad* is considered as a "juridical person" and given the same characteristics of a corporation. *Id* at 481-82.

Note that, in *Russell*, the *sociedad* was not deemed a citizen for diversity jurisdiction purposes, but for federal jurisdiction purposes. As notes 109-16 and the accompanying text discuss, *Russell* involved the Organic Act of Puerto Rico and not the diversity statute.

29. *Carden*, 110 S Ct at 1018 (quoting *Bouligny*, 382 US at 151). In response to Arkoma's argument that *Russell* showed the Court's willingness to move beyond the incorporated/unincorporated dichotomy, the Court answered:

There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships."

Carden, 110 S Ct at 1018 (quoting *Russell*, 288 US at 480).

30. 446 US 458 (1980).

31. *Carden*, 110 S Ct at 1019. See note 17.

32. *Carden*, 110 S Ct at 1019.

were real parties to the controversy.³³ In contrast, the situation presented in *Carden* involved a limited partnership, and involved the question of whether that association could be treated as a corporation for purposes of diversity jurisdiction.³⁴ The Court distinguished the two cases by pointing out that the trustees in *Navarro* sued in their own names while Arkoma, a limited partnership, brought suit in its own name.³⁵ The Court in *Navarro* only established that the trustees were

'active trustees whose control over the assets held in their names is real and substantial,' thereby bringing them under the rule, 'more than 150 years' old, which permits such trustees 'to sue in their own right, without regard to the citizenship of the trust beneficiaries.'³⁶

Thus answering its first question in the negative—that a limited partnership cannot be considered a "citizen" of the state that created it—the Court turned to its second question, whether the citizenship of a limited partnership's general partners is solely determinative of diversity jurisdiction.

Again pointing to the *Chapman*, *Great Southern*, and *Bouligny* decisions, the Court emphasized that all members' citizenship of those entities involved were taken into consideration to determine diversity jurisdiction.³⁷ Relying on those cases, the Court held that the citizenship of all members of a limited partnership, both limited and general partners, must be considered in determining whether diversity jurisdiction exists.³⁸

The majority took notice of "the changing realities of business organization," and stated that because limited partnerships are not so functionally different from corporations, the incorporated/unincorporated dichotomy is no longer backed by sound policy reasons.³⁹ But, because Congress had already taken a step in revising the jurisdictional statute to provide that a corporation should be deemed a citizen of its state of incorporation as well as its principal place of business, the Court left any further changes in the di-

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (quoting *Navarro*, 446 US at 465-66).

37. *Carden*, 110 S Ct at 1019-20. The Court stated: "No doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions." *Id.* at 1020.

38. *Id.* at 1021.

39. *Id.* at 1021-22.

versity statute to Congress.⁴⁰ Until then, the Court would "adhere" to the rule that diversity jurisdiction involving an unincorporated association depends on the citizenship of each member;⁴¹ in cases involving a limited partnership, the citizenship of both limited and general partners must be considered for purposes of diversity jurisdiction.

In her dissent, Justice O'Connor⁴² began her discussion by stating that the majority had no need to defer to Congress for rule-making, because the majority had just formulated the new rule that all members of an unincorporated association, without any analysis of the particular association itself, must be counted for diversity jurisdiction purposes.⁴³

The dissent stated that "complete diversity" between parties is not always required, such as in class actions under FRCP 23, or in matters involving parties joined under ancillary jurisdiction, or statutory interpleaders.⁴⁴ Rather, the Court has always considered whether the parties before them were real parties to the controversy before determining whether diversity jurisdiction was satisfied.⁴⁵ This preliminary investigation into which parties are the

40. *Id.* at 1022.

41. *Id.* at 1021.

42. Justice O'Connor was joined in her dissent by Justices Brennan, Marshall, and Blackmun.

43. *Carden*, 110 S Ct at 1023. The dissent stated the Court had previously formulated rules concerning diversity jurisdiction in *Navarro* and *Bouligny*. *Id.*

44. *Id.* In class actions under FRCP 23, only the citizenship of the class representatives are taken into consideration. *Carden*, 110 S Ct at 1023. The dissent cited *Owen Equipment & Erection Co. v Kroger*, 437 US 365, 375, and n.18 (1978), in which the citizenship of parties joined under ancillary jurisdiction was not considered. Also cited was *State Farm Fire & Casualty Co. v Tashire*, 386 US 523, 530-31 (1967), where a statutory interpleader was not considered for purposes of diversity jurisdiction. The Court held that diversity was satisfied as long as there was diversity between two or more of the claimants. *Carden*, 110 S Ct at 1023-24.

45. *Carden*, 110 S Ct at 1024. Cases cited by the dissent are *Wormley v Wormley*, 8 Wheat 421, 5 L Ed 651 (1823), in which the Court stated: "This court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others." *Id.* at 451 (footnote omitted); and *Wood v Davis*, 18 How 467, 469, 15 L Ed 460 (1856), wherein the Court stated: "It has been repeatedly decided by the [C]ourt, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction. . . ." *Carden*, 110 S Ct at 1024.

The dissent also cited *Marshall v Baltimore & Ohio R. Co.*, 16 How 314, 14 L Ed 953 (1854), and *United States v Deveaux*, 5 Cranch 61, 3 L Ed 38 (1809), in which the dissent claims a two-part test was applied by the Court: "(1) is the corporation a 'juridical person' which can serve as a real party to the controversy . . . ; and (2) are the shareholders real parties to the controversy." *Carden*, 110 S Ct at 1024.

real parties to the controversy has historically been a "necessary prerequisite" to the determination of whether diversity jurisdiction exists.⁴⁶

Citing the same three cases the majority relied upon—*Chapman*, *Great Southern*, and *Bouligny*—the dissent claimed that the Court in those cases did not need to inquire which parties before it were the real parties to the controversy, because the associations involved were not themselves citizens and the members of the associations were equally situated in terms of power and control over the assets, business, and litigation of the association.⁴⁷

In *Navarro*, Justice O'Connor continued, the Court unanimously applied the "real party to the controversy" test to determine if diversity existed, because the beneficiaries of the trust lacked control over the business of the trust as well as over the litigation.⁴⁸ Had the Court considered the nature of the party named in the suit, as the majority in *Carden* suggested, then the discussion of which parties were the real parties to the controversy in *Navarro* was "wholly superfluous."⁴⁹ This is especially so, said the dissent, considering that the beneficiaries were not even named in the suit, yet were subjected to the "real party to the controversy" test.⁵⁰ Thus, the dissent concluded, *Navarro* required the application of the "real party to the controversy" test.

Justice O'Connor stated that a limited partnership is similar to a business trust in that one class of members has the power, and the other class cannot control any aspect of the business, its assets, or the litigation.⁵¹ Applying the "real party to the controversy" test used in *Navarro* to the limited partnership involved in *Carden*, only the citizenship of the general partners of Arkoma is determinative of diversity jurisdiction.⁵² Noting that most states have adopted the Uniform Limited Partnership Act, which precludes a limited partner from judicial proceedings regarding the partnership, the dissent stated that use of the "real party to the controversy" test would result in uniformity because limited partners would not be considered for diversity jurisdiction purposes.⁵³

46. *Carden*, 110 S Ct at 1025 (interpreting *Marshall*, 16 How 314, 14 L Ed 953 (1854)).

47. *Carden*, 110 S Ct at 1025.

48. *Id* at 1026.

49. *Id*.

50. *Id*.

51. *Id* at 1026-27.

52. *Id* at 1026.

53. *Id* at 1027. Section 26 of the Uniform Limited Partnership Act (1976) states that

The dissent stated that perhaps one factor that led to the holding of the majority was their fear of overburdening federal court dockets.⁵⁴ The dissent claimed that this fear is groundless because unincorporated associations may evade the Court's holding by bringing a class action under FRCP 23, in which case the citizenship of the class members would be irrelevant for diversity jurisdiction purposes.⁵⁵

Despite the majority's attentiveness to the *Russell* case, the dissent found that case not directly related to the issue of whether a limited partner's citizenship is to be considered for diversity purposes.⁵⁶ The issue in *Russell* was whether the suit could be removed to the United States District Court for Puerto Rico from Puerto Rico's Insular Court because neither side contained a party who was a citizen of Puerto Rico.⁵⁷ The dissent stated that the majority's attempt to distinguish *Russell* was "seriously flawed."⁵⁸ Although *Russell* presented an issue different from that in *Carden*, the dissent found no reason to treat the two entities differently, because a *sociedad en comandita* and a limited partnership are virtually the same in form and function.⁵⁹ The dissent concluded by stating that the dissimilar treatment of the two associations "is justified neither by our precedents nor by historical and commercial realities."⁶⁰

The federal courts are granted their judicial power in Article III of the United States Constitution.⁶¹ Article III states, in pertinent part, that "[t]he judicial Power shall extend . . . to Controversies . . . between Citizens of different States. . . ."⁶²

Congress first authorized the federal courts to exercise diversity jurisdiction in the Judiciary Act of 1789.⁶³ The modern diversity

a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." Uniform Limited Partnership Act § 26 (1976).

54. *Carden*, 110 S Ct at 1027.

55. *Id.* See note 44 and accompanying text.

56. *Carden*, 110 S Ct at 1027.

57. *Id.*

58. *Carden*, 110 S Ct at 1027.

59. *Id.* at 1028.

60. *Id.* The dissent noted that both the limited partnership and the *sociedad en comandita* originated in the civil law, and both are descendants of an ancient French association. *Id.*

61. US Const, Art III, § 2, cl 1.

62. *Id.*

63. Judiciary Act of 1789, ch 20, § 11, 1 Stat 78. Section 11 states in pertinent part: Sec. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at

jurisdiction statute is codified in 28 USC § 1332 (1988).⁶⁴

The traditional theory advanced for the establishment of diversity jurisdiction is that it serves to protect non-residents from real or imagined prejudices by state courts.⁶⁵ Advocates of limiting or abolishing diversity jurisdiction claim that this basis for federal jurisdiction is no longer necessary in modern times, and also costly because of the large number of diversity cases in federal courts.⁶⁶ Other reasons advanced for reducing the jurisdiction of the federal judiciary over diversity cases are that federal judges are not authoritative on state law, which must be applied; federal courts interfere with the autonomy of a state in applying its laws; and federal jurisdiction reduces incentive to reform a state's judicial system.⁶⁷ Defenders of diversity jurisdiction offer seemingly valid reasons as well for its continued present existence: state court prejudices against non-residents still exist; the Constitution guarantees the citizens of each state all the privileges and immunities of citizens of the several states; the federal judges' constitutional guarantees of life tenure and undiminished salary result in "better justice;" and that the availability of a federal forum encourages capital investments by enterprises not local and leads to economic growth of the nation as a whole.⁶⁸ While the debate on whether or not to retain diversity jurisdiction is lively, it is doubtful that the question will be resolved in the near future.⁶⁹

*Strawbridge v Curtiss*⁷⁰ was the first case before the United States Supreme Court requiring an application of the diversity

common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State. . . .

The Constitution established only the Supreme Court, and left the establishment of "inferior Courts" to the discretion of Congress. US Const, Art III, § 1. When Congress enacted the Judiciary Act of 1789, it created the lower federal courts and defined their jurisdiction. Erwin Chemerinsky, *Federal Jurisdiction* § 1.2 at 8 (Little, Brown and Company 1989).

64. See note 9 for relevant portions of the diversity statute.

65. Chemerinsky, *Federal Jurisdiction* § 5.3.2 at 242 (cited in note 63). But see, Henry Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv L Rev 483 (1928), wherein Judge Friendly offers the alternative theory that diversity jurisdiction resulted from the fear of what state court hostility could do to commercial interests.

66. Charles Alan Wright, *Handbook of the Law of Federal Courts* § 23 at 133 (West, 4th ed 1983).

67. Wright, *Federal Courts* § 23 at 133 (cited in note 66).

68. *Id.*

69. See Wright, *Federal Courts* (cited in note 66): "Any proposal to modify diversity meets immediate organized opposition from those who believe that they have a vested interest in preserving, for their own advantage, the widest possible choice of forum." *Id.* at 92.

70. 7 US (3 Cranch) 267 (1806).

statute. In *Strawbridge*, the complainants were alleged to be citizens of Massachusetts.⁷¹ All but one of the defendants were also alleged to be citizens of Massachusetts; Curtiss, the named defendant, was alleged to be a citizen of Vermont.⁷² The complainants' bill in chancery was dismissed by the circuit court for lack of jurisdiction.⁷³ The Supreme Court affirmed the decree of the circuit court, holding that complete diversity must exist.⁷⁴

Since the Supreme Court's decision in *Louisville, Cincinnati, and Charleston Railroad Co. v Letson*,⁷⁵ corporations have been considered citizens of their state of incorporation for purposes of diversity jurisdiction. In *Letson*, a citizen of New York brought suit, in the district court of the United States for the District of South Carolina, against the railroad company, a corporation located in South Carolina.⁷⁶ The railroad company filed a plea to the jurisdiction, alleging that some members of the corporation were citizens of New York,⁷⁷ thus destroying complete diversity. The circuit court sustained the plaintiff's demurrer to the plea, and after trial the jury found for the plaintiff.⁷⁸ On writ of error, the Supreme Court considered the issue of whether a corporation can be considered a citizen for purposes of diversity jurisdiction.⁷⁹ The Court held that a corporation is to be deemed a citizen of its state of incorporation because, although not a natural person, it has qualities and abilities of a citizen for purposes of suing and being sued.⁸⁰

Ten years later, the Court reached substantially the same result, but by way of a different theory. In *Marshall v Baltimore and Ohio Railroad Co.*,⁸¹ the Supreme Court held that the members of a corporation are, for purposes of diversity jurisdiction, to be conclusively presumed to be citizens of the state of incorporation.⁸²

71. *Strawbridge*, 7 US at 267.

72. *Id.*

73. *Id.*

74. *Id.*

75. 43 US (2 How) 497 (1842).

76. *Letson*, 2 US at 497.

77. *Id.* at 497-98.

78. *Id.* at 498.

79. *Id.* at 552.

80. *Id.* at 555. In so holding, the Court departed from its previous decision in *Bank of United States v Deveaux*, 9 US (5 Cranch) 61 (1809), in which the Court stated: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; . . ." *Deveaux*, 9 US at 86.

81. 57 US (16 How) 314 (1853).

82. *Marshall*, 57 US at 328-29.

The Court reasoned that those seeking to sue a corporation have dealt not with the fictitious entity itself, but with real and natural persons which the corporation represents.⁸³ The representative capacity of the corporation, as established by state law for the convenience of its members, cannot be used against those seeking to vindicate their rights to deprive them of an impartial forum in federal court.⁸⁴ The Court stated that, for equitable reasons, members of a corporation should be estopped from declaring a domicile other than the state of incorporation.⁸⁵ Otherwise, a corporation could avoid being sued simply by choosing directors residing in different states.⁸⁶

Congress made the next move by amending to the diversity statute, which had provided that, for purposes of diversity jurisdiction, a corporation is deemed to be a citizen of its state of incorporation,⁸⁷ to also include that for purposes of diversity, a corporation is deemed a citizen of the state where it has its principal place of business.⁸⁸

In two cases following *Marshall*, the Court had to decide whether certain entities other than corporations could invoke the jurisdiction of a federal court under the diversity statute. In *Chapman v Barney*,⁸⁹ the United States Express Company, averred to be a joint stock company organized under the laws of New York,⁹⁰ brought suit, on the basis of diversity, against an Illinois citizen in

83. Id at 327-28.

84. Id at 327. The Court stated that citizens of one state, involved in a controversy with citizens of another state, are guaranteed the right or privilege of access to an impartial federal court by Article III, Section 2 of the Constitution, and that "[s]tate laws, by combining large masses of men under a corporate name, cannot repeal the Constitution." Id at 326-27.

85. Id at 328.

86. Id.

87. 72 Stat 415 (1958), 28 USC § 1332(c) provides: "For the purposes of this section and section 1441 of this title [relating to actions removable] a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 USC § 1332(c) (1988).

The wording of the statute makes it clear that Congress adopted the Court's approach in *Letson* and not *Marshall*, in which the Court held that the shareholders of a corporation are to be presumed to be citizens of the state of incorporation. See discussion of *Marshall* beginning at note 81.

88. 28 USC § 1332(c)(1) (1988). It is sometimes difficult to determine a corporation's principle place of business. Courts have looked at different factors to answer this question, such as where most of the corporate policy is formulated; where most of the corporation's assets are located; where most of the corporate activity takes place; or where the corporate headquarters are located. Chemerinsky, *Federal Jurisdiction* § 5.3 at 250 (cited in note 63).

89. 129 US 677 (1889).

90. *Chapman*, 129 US at 682.

the district court of the United States for the Northern District of Illinois.⁹¹ The United States Express Company also averred that the company was authorized by state law to sue and be sued in the name of its president, and that the company itself was a citizen of New York.⁹² The Court *sua sponte* considered the issue of whether diversity jurisdiction was satisfied.⁹³ The Court stated that the joint stock company was not a corporation, and therefore did not come within the statute regulating diversity jurisdiction.⁹⁴ The fact that state law authorized the company to sue in the name of its president, and that the company was organized under state law, did not bring the joint stock company within the provisions of the diversity statute.⁹⁵ The Court went on to reason that the citizenship of each member of the joint stock company had to be shown in the record to be diverse from the Illinois defendant for diversity jurisdiction to be satisfied.⁹⁶

In the second case, *Great Southern Fire Proof Hotel Co. v Jones*,⁹⁷ a limited partnership association organized under Pennsylvania law brought suit against several defendants from states other than Pennsylvania.⁹⁸ In its bill, the limited partnership association described itself as a citizen of Pennsylvania.⁹⁹ Under Pennsylvania law,¹⁰⁰ the association could sue and be sued in its own name.¹⁰¹ The Court stated that, under the state law creating it, the limited partnership could be described as a "quasi-corporation," having characteristics of both a corporation and a partnership.¹⁰²

91. *Id.* at 677-78.

92. *Id.* at 679.

93. *Id.* at 681.

94. *Id.* at 682. See discussion of *Chapman* in note 26. A joint stock company is an unincorporated association which has some attributes of a corporation, namely the transferability of shares and centralized management by chosen representatives. Judson A. Crane, *Handbook on the Law of Partnership and other Unincorporated Associations* 156 (West, 2d ed 1952). Members of a joint stock company are subject to personal liability on the association's obligations. Crane, *Partnership* at 157 (cited within this note).

95. *Chapman*, 129 US at 682.

96. *Id.*

97. 177 US 449 (1900).

98. *Great Southern*, 177 US at 450. A limited partnership association is formed according to state law and possesses many attributes of a corporation. These attributes are centralized management, transferability of shares, the right to sue and be sued, the ability to own property, and limited liability of its members. Like a partnership, a limited partnership association can be selective as to who may join as a members. Crane, *Partnership* 112-13 (cited in note 94).

99. *Great Southern*, 177 US at 450.

100. 1 Brightly's Purdon's Digest Pa., *Joint Stock Companies* § 16 at 1088 (12th ed).

101. *Great Southern*, 177 US at 455.

102. *Id.* at 456-57. See note 98.

The Supreme Court found *Chapman* controlling,¹⁰³ and stated that for diversity jurisdiction purposes, the citizenship of each member of the limited partnership association had to be shown in the record.¹⁰⁴ Because the association was not a corporation,¹⁰⁵ and because the citizenship of each member of the association was not shown in the record, the corporation could not invoke federal jurisdiction.¹⁰⁶ The Court stated that, although the association could sue and be sued by the association name under state law, this fact did not entitle the association to treatment as a corporation for purposes of jurisdiction.¹⁰⁷ Recognizing the rule that corporations are deemed citizens of their state of incorporation, the Court noted that no such rule had been applied to limited partnership associations, even though those associations may somewhat resemble a corporation.¹⁰⁸

A third of a century later, *Puerto Rico v Russell & Co.*¹⁰⁹ was decided by the Supreme Court. In *Russell*, the people of Puerto Rico brought suit against a *sociedad en comandita*, an association organized under the laws of Puerto Rico, the membership of which contained no citizens or domiciles of Puerto Rico.¹¹⁰ The suit was originally brought in the Insular Court of Puerto Rico, but the defendants removed the case to the United States District Court for Puerto Rico.¹¹¹ Under the Organic Act of Puerto Rico, the United States District Court of Puerto Rico has, in addition to the usual jurisdiction conferred on federal district courts, jurisdiction of

103. *Id.* at 455.

104. *Id.* at 458.

105. *Id.* at 454.

106. *Id.* at 454-55. See discussion of *Great Southern* in note 26.

107. *Id.* at 455-56.

108. *Id.* at 456.

109. 288 US 476 (1933).

110. *Russell*, 288 US at 477.

111. *Id.* at 477. The District Court of Puerto Rico is a territorial court, as opposed to a constitutional court. *United States v Montanez*, 371 F2d 79, 83 (2d Cir 1967). A constitutional court is one that derives its authority from Article III, Section 1 of the Constitution, while a territorial court, also called a legislative court, derives its authority from another section of the Constitution, such as Article IV, § 3, cl 2, which authorizes Congress to enact necessary legislation as to the territories of the United States. *Montanez*, 371 F2d at 82, 83. Besides deriving its authority from other than Article III, territorial courts differ from constitutional courts in that the judges on constitutional courts hold tenure during good behavior, and cannot have their salary diminished, as provided for in Article III. Wright, *Federal Courts* 30 (cited in note 66). The judges on Puerto Rico's District Court at one time served for only eight years, but since Congress enacted legislation in 1966, the judges enjoy life tenure. *Montanez*, 371 F2d at 83; Pub L No 89-571, 80 Stat 764 (Sept 12 1966), 28 USC § 134(a) (Supp 1966).

suits "where all of the parties on either side of the controversy are citizens of a foreign State or States, or Citizens of a State, Territory or District of the United States not domiciled in Puerto Rico . . ." and where the amount in controversy requirement is met.¹¹² The Supreme Court considered whether the members of the *sociedad* were "parties" under the Organic Act. If so, and because of their non-residence in Puerto Rico, removal to the United States District Court for Puerto Rico was proper, and diversity of citizenship would be unnecessary.¹¹³ But the Court found that the proper party in the proceeding was the *sociedad* itself and not its individual members because, under the civil law of Puerto Rico, the *sociedad* was "consistently regarded as a juridical person."¹¹⁴ Referring to the situation of corporations, the Court stated that the rule regarding corporations as citizens of their state of incorporation for purposes of diversity jurisdiction resulted from the "complete legal personality" conferred on them by state law.¹¹⁵ The Court reasoned that because the *sociedad's* "personality [was] so complete in contemplation of the law of Puerto Rico," it was to be treated as

112. Organic Act of Puerto Rico, 18 USCA §§ 863, 864 (1948). This additional jurisdiction is conferred on the District Court for Puerto Rico despite its definition as a "court of the United States." 28 USCA § 451 (West 1968).

113. *Russell*, 288 US at 478. Because the plaintiff was the government of Puerto Rico, the defendant could not have availed himself of diversity jurisdiction as provided in the United States Constitution. Puerto Rico, as a party in the suit and a territory, is not a citizen of a state as required by the diversity statute. *Postal Tel. Cable Co. v Alabama*, 155 US 482, 487 (1894). See also, *United Steelworkers of America, AFL-CIO v Bouligny*, 336 F2d 160, 162, n.1 (4th Cir 1961).

114. *Russell*, 288 US at 480-81. Under the civil law of Puerto Rico, the Court noted that a *sociedad*

may contract, own property and transact business, sue and be sued in its own name and right . . . Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant . . . It is created by articles of association filed as public records . . . Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. . . .

Certain members are vested with

powers of management . . . and they alone may perform acts legally binding on the *sociedad* . . . Its members are not primarily liable for its acts and debts . . . , and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital . . . [T]he members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them, . . . [but] this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states.

Id at 480 (citations omitted).

115. *Id* at 479.

a corporation for purposes of federal jurisdiction and deemed a citizen of Puerto Rico for purposes of the Organic Act.¹¹⁶

Thirty years after *Russell*, in *United Steelworkers of America, AFL-CIO v R.H. Bouligny, Inc.*,¹¹⁷ the Supreme Court once again had to decide whether an association other than a corporation could be considered a "citizen" under the diversity statute. In *Bouligny*, a North Carolina corporation brought an action against an unincorporated labor union in a North Carolina state court.¹¹⁸ The labor union removed the action to federal court, alleging that diversity jurisdiction was satisfied because it was a citizen of Pennsylvania, even though some of the union members were citizens of the same state as the plaintiff.¹¹⁹ Relying on "the generally prevailing principle" that each member's citizenship of an unincorporated association must be considered to determine the existence of diversity jurisdiction, the North Carolina corporation sought to have the case remanded to the state court, but the district court refused.¹²⁰ Noting a trend to treat unincorporated associations for diversity jurisdiction purposes as corporations, the district judge refused to follow the rule of *Chapman*.¹²¹ The Court of Appeals for the Fourth Circuit reversed the district court on interlocutory appeal, and remanded the case to the state court.¹²² On certiorari to the United States Supreme Court, the sole issue was whether an unincorporated labor union was to be considered a citizen in determining whether diversity jurisdiction was satisfied.¹²³

The Court found persuasive the labor union's argument that the distinction between corporations and unincorporated associations has become "artificial and unreal" in light of the functions and structure of the associations.¹²⁴ This was especially true, said the Court, in the present case, in which the expansion of diversity jurisdiction to include labor unions would fulfill the original purpose

116. *Id.* at 482. The Court did *not* hold that the *sociedad* was to be deemed a citizen for purposes of the diversity statute under Article III of the United States Constitution. See *Bouligny*, 336 F2d 160, 163 (4th Cir 1964).

117. 382 US 145 (1965).

118. *Bouligny*, 382 US at 146.

119. *Id.* The labor union also alleged that the action, based on the National Labor Relations Act, arose under the laws of the United States, but the Fourth Circuit found that no federal question jurisdiction existed. *Bouligny*, 336 F2d 160, 164-65 (4th Cir 1964).

120. *Bouligny*, 382 US at 146.

121. *Id.* The district judge termed *Chapman's* rule as "poorer reasoned" and against "common sense." *Id.*

122. *Id.*

123. *Id.* at 147.

124. *Id.* at 149-50.

of the diversity statute—to protect the non-resident party from prejudice in the local courts.¹²⁵ However, the Court decided that any expansion of diversity jurisdiction to include previously uncovered groups, such as unincorporated labor unions, should be left to Congress.¹²⁶ Congress would best be able to formulate a rule to accommodate unions for purposes of diversity jurisdiction.¹²⁷

In response to the labor union's argument that the rule established in *Chapman* was no longer sound in light of the Court's decision in *Russell*, the Court distinguished the *sociedad en comandita* involved in *Russell* from other associations, stating that the *sociedad* was, under the civil law of Puerto Rico, consistently treated as a "juridical person."¹²⁸ The Court stated that the purpose of its decision in *Russell* was to prevent non-residents of Puerto Rico from forming such organizations to do business there, and then removing controversies grounded in local law from Puerto Rico's Insular Court to the district court.¹²⁹ The Court also stated that *Russell* did not expand diversity jurisdiction because, as Puerto Rico was not a "State" in terms of the diversity statute, the *sociedad* could not have invoked diversity jurisdiction under the general diversity statute, but only in accordance with the terms of the Organic Act of Puerto Rico.¹³⁰

When presented with a situation involving a business trust fifteen years after *Boulogny*, the Court did not follow the incorporated/unincorporated dichotomy it had established in *Chapman*, *Great Southern*, and *Boulogny*. In *Navarro Savings Association v Lee*,¹³¹ the individual trustees of a business trust organized under Massachusetts law brought suit against a Texas corporation.¹³² Although each of the trustees was a citizen of a state other than

125. Id at 150. The labor union, in support of its argument, had introduced evidence that a union's organization campaign, as in the present case, aroused "economic and racial fears" in a locality. It was argued that allowing labor unions into the federal courts would derive benefits from a more impartial judge and jury, as well as a "more effective review" by the United States Supreme Court. Id.

126. Id at 150-51.

127. Id at 152. The Court was hesitant to form such a rule from *Boulogny* for fear that the record and case itself were not conducive for such a necessarily generalized rule. Id. The Court was unsure what kind of test would be necessary to determine the state of citizenship of unions, which usually have local as well as national organizations. Id at 152-53. The Court compared this dilemma to the rule for corporations, which have a natural reference point to their state of incorporation for purposes of "citizenship." Id at 152.

128. Id at 151.

129. Id at 152, n.10.

130. Id at 152. See note 113.

131. 446 US 458 (1980).

132. *Navarro*, 446 US at 459.

Texas, some of the trust's beneficial shareholders were citizens of Texas.¹³³ The district court dismissed the action because it considered the citizenship of the trust's beneficiaries and found complete diversity lacking.¹³⁴ The Court of Appeals for the Fifth Circuit reversed, holding that the trustees were the only real parties in interest because of their power to manage and control the trust and to bring suit on its behalf, and so only the citizenship of the trustees was to be considered for purposes of diversity jurisdiction.¹³⁵ On certiorari to the Supreme Court, the issue to be decided was whether only the citizenship of the trustees of a business trust was to be considered for purposes of diversity jurisdiction, without regard to the citizenship of the trust's beneficiaries.

The Court began its analysis by stating that one must be a real party to the controversy to be considered for diversity jurisdiction purposes, and that "a federal court must disregard nominal or formal parties. . . ."¹³⁶ The Court recognized that, while corporations have long been deemed to be citizens, "unincorporated associations remain mere collections of individuals. When the 'persons composing such associations' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court."¹³⁷

The Court then distinguished the present situation by stating that the business trust was neither a corporation nor an unincorporated association.¹³⁸ To resolve the issue of whose citizenship was determinative of diversity jurisdiction, the Court turned to a rule established in 1808 by the Supreme Court providing that the trustees of a business trust "are entitled to bring diversity actions in their own names and upon the basis of their own citizenship."¹³⁹

133. Id at 460.

134. Id. The district court "[c]onclud[ed] that a business trust is a citizen of every State in which its shareholders reside." Id. See note 19.

135. *Navarro*, 446 US at 460.

136. Id. The Court cites *McNutt v Bland*, 43 US (2 How) 9 (1844) for these propositions. In *McNutt*, three New York citizens sued a Mississippi citizen in the name of the governor of Mississippi. *McNutt*, 43 US at 10. They did so because the governor held a bond, to assure the faithful performance of the sheriff's duties, on which the plaintiffs were attempting to recover. Id at 9. The Court said that the New York citizens were the "real and only plaintiffs," and jurisdiction should not be denied because the governor was "a purely naked trustee. . . . [He] cannot prevent the institution or prosecution of the suit, nor has he any control over it. . . ." Id at 13-14.

137. *Navarro*, 446 US at 461 (quoting *Great Southern Fire Proof Hotel, Co. v Jones*, 177 US 449, 456 (1900); *Steelworkers v Bouligny, Inc.*, 382 US 145 (1965); and *Chapman v Barney*, 129 US 677 (1889)).

138. *Navarro*, 446 US at 462.

139. Id. The Court cites *Chappelaine v Dechenaux*, 4 Cranch 306, 308 (1808) as the

The Court stated that when a trustee has the power to manage the trust to benefit the beneficiaries, then the trustee's citizenship is considered for purposes of diversity jurisdiction because he is the real party to the controversy.¹⁴⁰ The Court concluded that because the trustees in the instant case held legal title to the trust's assets, were able to invest the assets to benefit the shareholders, and could sue and be sued in their own names as trustees, then in accordance with the rule established in 1808 mentioned above, they were the real parties to the controversy.¹⁴¹

Following the Court's decision in *Navarro*, a majority of the circuit courts have held that the incorporated/unincorporated dichotomy established in *Chapman* applies to suits involving limited partnerships.¹⁴² That is, the citizenship of all members of a limited partnership, both general and limited partners, is to be considered to determine whether diversity jurisdiction exists. The reasons given by the circuit courts are varied: *Navarro* is expressly limited to express trusts;¹⁴³ the Court in *Navarro* affirmed the rule established in *Chapman* and cited with approval the *Great Southern* decision;¹⁴⁴ the Court in *Navarro* expressly rejects an attempt to

case establishing this rule. *Chappedelaine* involved two plaintiffs—a residuary legatee and the administrator of a Georgia decedent's estate—who sued the executor of another Georgia decedent's estate for an accounting. *Chappedelaine*, 4 Cranch at 306. On writ of error to the Supreme Court, the defendant assigned as error that, although the complainants were alleged to be French citizens and the defendant alleged to be a citizen of Georgia, the court lacked jurisdiction because the two decedents were citizens of Georgia. *Id.* at 307. Chief Justice Marshall found that diversity jurisdiction was satisfied because "the plaintiffs were aliens and, suing as trustees, were entitled to invoke federal jurisdiction." *Id.* at 308.

140. *Navarro*, 446 US at 464. The Court cited *Bullard v Cisco*, 290 US 179 (1933) for this proposition. In *Bullard*, holders of bonds and coupons transferred them to a committee according to a bondholders protective agreement. *Bullard*, 290 US at 181. The committee brought suit to collect on the bonds and coupons. *Id.* at 180. The Court held that the citizenship of the committee members was to be considered for purposes of diversity jurisdiction. Although the agreement did not designate it as such, the Court found that an "express trust" had been created: the committee members were the trustees and the original bond and coupon holders were the beneficiaries. *Id.* at 189.

141. *Navarro*, 446 US at 464-65.

142. See *SHR Limited Partnership v Braun*, 888 F2d 455 (6th Cir 1989); *Alexander Proudfoot Co. World Headquarters v Thayer*, 877 F2d 912 (11th Cir 1989); *Stouffer Corp. v Breckenridge*, 859 F2d 75 (8th Cir 1988); *New York State Teachers Retirement System v Kalkus*, 764 F2d 1015 (4th Cir 1985); *Elston Inv. Ltd. v David Altman Leasing Corp.*, 731 F2d 436 (7th Cir 1984); *Trent Realty Associates v First Fed. Sav. & Loan Association*, 657 F2d 29 (3d Cir 1981).

143. *Trent Realty Associates v First Fed. Sav. & Loan Association*, 657 F2d 29, 32 (3d Cir 1981); *New York State Teachers Retirement System v Kalkus*, 764 F2d 1015, 1018 (4th Cir 1984). See notes 72 and 73 and accompanying text.

144. *Elston Inv. Ltd. v David Altman Leasing Corp.*, 731 F2d 436, 437 (7th Cir 1984). See note 169 and accompanying text.

analogize a limited partnership to a business trust;¹⁴⁵ *Navarro* is decided exclusively by reliance on a settled rule that allows trustees of an express business trust to sue on behalf of its beneficiaries without regard to their citizenship.¹⁴⁶

One circuit court, however, has interpreted the Court's decision in *Navarro* to mandate the application of a "real party to the controversy" test in situations involving limited partnerships to determine which parties' citizenship is determinative of diversity jurisdiction, and has held that a limited partner's citizenship is irrelevant for diversity jurisdiction purposes.¹⁴⁷

The dissent in *Carden* also found that the "real party to the controversy" analysis employed in *Navarro* should be applied to situations involving limited partnerships.¹⁴⁸ However, the majority correctly recognized the distinction between corporations and unincorporated associations developed in *Chapman*, *Great Southern*, and *Boulogny*, and thus is more consonant with Supreme Court precedent than is the dissent. This trilogy of cases clearly demonstrates that only incorporated entities are considered "citizens" for purposes of diversity jurisdiction. This writer ponders, however, why the majority did not rely on the fact that the diversity statute explicitly provides for the "citizenship" of corporations only, without regard to unincorporated associations.¹⁴⁹ The majority in *Carden* simply deferred to Congress to enlarge the reach of the diversity statute, without considering that amendment of the jurisdictional statute would necessarily be a purely legislative function.

The majority's attempt to distinguish the situation in *Russell* from that presented in *Carden* may be criticized as inadequate. The Court merely stated that the association involved in *Russell*, the *sociedad en comandita*, was an "exotic creation of the civil

145. *Elston*, 731 F2d at 438. See note 172 and accompanying text.

146. *Kalkus*, 764 F2d at 1018. See note 169 and accompanying text.

147. *Mesa Operating Ltd. Partnership v Louisiana Intrastate Gas Corp.*, 797 F2d 238 (5th Cir 1986). In *Mesa*, the Fifth Circuit analogized a limited partnership to the business trust in *Navarro*, and held that, because the general partners held all control over the partnership, they were real parties to the controversy and only their citizenship would determine whether diversity jurisdiction exists. *Mesa*, 797 F2d at 240, 242.

The Second Circuit in *Colonial Realty Corp. v Bache & Co.*, 358 F2d 178 (2d Cir 1966), cert denied, 385 US 817, reached the same result as the court in *Mesa*, but applied New York partnership law to determine that limited partners were not real parties to the controversy, thus holding their citizenship irrelevant for diversity jurisdiction purposes. *Colonial Realty*, 358 F2d at 183. The *Colonial Realty* decision occurred before the decision in *Navarro*.

148. *Carden*, 110 S Ct at 1026. See note 48 and accompanying text.

149. See note 9.

law," and its relationship to the "federal scheme" was unknown.¹⁵⁰ The Court seemed to imply that the situation in *Russell* called for an exception to the general rule that unincorporated associations are not considered citizens for purposes of diversity jurisdiction. This simply was not the case in *Russell*. The Court should have distinguished *Russell* on the stronger basis that it did not involve the application of the diversity statute, but the application of the Organic Act of Puerto Rico.¹⁵¹

The majority in *Carden* as well could have distinguished the *Navarro* case more clearly. In order to do so, the majority should have explicitly stated that a situation involving an express trust calls for the application of a rule entirely different from that applied when the situation involves a corporation or an unincorporated association. Although the majority did say that *Navarro* was decided in accordance with a rule established 150 years before, that trustees of a business trust may sue in their own name without regard to the citizenship of the beneficiaries, the Court in *Carden* should have been more explicit regarding the historically different treatment of trusts, as opposed to corporations/unincorporated associations, for purposes of diversity jurisdiction.¹⁵²

The dissent in *Carden* stated that the Court should have applied a "real party to the controversy" test to the limited partnership, because the Court has previously used the same approach in regard to business associations.¹⁵³ The dissent cited *Bank of the United States v Deveaux*¹⁵⁴ and *Marshall v Baltimore & Ohio R. Co.*¹⁵⁵ as the first decisions by the Court in which the "real party to the controversy" test was used;¹⁵⁶ however, a close reading of these cases reveals that the test was not applied in those cases.

In *Deveaux*, the Court decided that the citizenship of all members of a corporation is to be considered for purposes of diversity jurisdiction, but not as a result of the application of the "real party to the controversy" test. Rather, the Court reasoned that the corporation merely "represents" its members, "and the controversy [was], in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right,

150. *Carden*, 110 S Ct at 1018. See note 29 and accompanying text.

151. See discussion of *Russell* at notes 109-16 and accompanying text.

152. See discussion of *Navarro* at note 169 and accompanying text.

153. *Carden*, 110 S Ct at 1024.

154. 5 Cranch 61, 3 L Ed 38 (1809).

155. 16 How 314, 14 L Ed 953 (1854).

156. See note 45 and accompanying text.

and the individual against whom the suit may be instituted.”¹⁵⁷ The Court did not consider which members of the corporation controlled the business or the litigation, characteristics which the dissent in *Carden* urged to be indicative of the real parties to the controversy.¹⁵⁸

In *Marshall*, as well, the Court did not apply a “real party to the controversy” test. In fact, the Court expressly refused to use the test, finding that the averment that the defendant was a corporation of Maryland was sufficient to show the citizenship of the parties in light of its holding that a corporation’s shareholders are presumed to be citizens of the state of incorporation.¹⁵⁹ The Court did not, as the dissent in *Carden* stated, “consider which citizens held control over the business decisions and assets of the corporation and over the initiation and course of litigation involving the corporation.”¹⁶⁰ The holding in *Marshall* is worth repeating, that the shareholders of a corporation are to be presumed to be citizens of the state of incorporation. With this presumption in mind, it is clear that the Court in *Marshall* based its diversity jurisdiction on the citizenship of the shareholders, presumed to be citizens of the state of incorporation, rather than on the “citizenship” of the corporation itself, as the dissent in *Carden* erroneously stated.¹⁶¹ The Court in *Marshall* stated that because the citizenship of the par-

157. *Deveaux*, 5 Cranch at 87-88.

158. *Carden*, 110 S Ct at 1026. The majority in *Carden* also found that *Deveaux* was not decided by the application of the “real party to the controversy” test:

Deveaux . . . [applied] the principle that for jurisdictional purposes the corporation has no substance, and merely ‘represents’ its shareholders; but even if it can be regarded as applying a ‘real party to the controversy’ test, it deems that test to be met by all the shareholders of the corporation, without regard to their ‘control over the operation of the business’.

Id at 1020 (citations omitted).

159. *Marshall*, 16 How at 329.

160. *Carden*, 110 S Ct at 1024.

161. *Id*. The dissent in *Carden* erroneously stated that the Court in *Marshall* determined that the corporation itself, and not its members, controlled corporate decisions, assets, and litigation. *Id*. The majority opinion in *Carden* as well failed to notice that the Court in *Marshall* considered the presumed citizenship of the shareholders rather than the “citizenship” of the corporation. The majority in *Carden*, rather than finding that *Marshall* supports its holding, attempted to distinguish *Marshall* by stating that its “analysis was a complete fiction; the real citizenship of the shareholders . . . was not consulted at all.” *Id* at 1020. This writer finds that *Marshall* supports the majority opinion in *Carden* because the Court in *Marshall* did not apply the “real party to the controversy” test to determine which parties’ citizenship should be counted for diversity jurisdiction purposes. The majority in *Carden*, however, conceded to the dissent’s point of view that *Marshall* “contains language quite clearly adopting a ‘real party to the controversy’ approach, and arguably even adopt[s] a ‘control’ test for that status.” *Id*.

ties could be "presumed or legally inferred" from the averment that the defendant corporation was incorporated in Maryland, the declaration sufficiently showed the citizenship of the parties.¹⁶² That the Court considered the *presumed* citizenship of the shareholders is evidenced in the following passage from the *Marshall* opinion:

If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being *conclusive* as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the "defendants are a body corporate by the Act of the General Assembly of Maryland," is a sufficient averment that the real defendants are citizens of that State.¹⁶³

The dissent found that *Chapman*, *Great Southern*, and *Bouligny* supported its view that the "real party to the controversy" test should be applied in *Carden*. The dissent claimed that, in those cases, "the Court was not called upon to determine which of the citizens before it were the real parties to the controversy because the business associations were not citizens themselves and the members of each association held equivalent power and control over the association's assets, business, and litigation."¹⁶⁴

The dissent is disillusioned about the Court's analysis in *Chapman*, *Great Southern*, and *Bouligny*. The Court in those three cases did not approach the issues presented as the dissent in *Carden* claimed. For the dissent to have stated that the Court did not have to apply the "real party to the controversy" test in those decisions, because the entities themselves were not citizens and because the members of each entity held equal control over the business, is to ignore the reasoning in those decisions and to ignore the facts in those cases as well.

The analysis suggested by the dissent in *Carden* simply cannot be found in *Chapman*, *Great Southern*, or *Bouligny*. In each case, upon determining that the association before them was not a corporation, and thus not a citizen, the Court went no further. Applying that single criteria, the Court held that each member's citizenship had to be counted. There was not, as the dissent stated in *Carden*, a two-pronged test. The individual characteristics and powers of the members of the entities involved in *Chapman*, *Great*

162. *Marshall*, 16 How at 329.

163. *Id* (emphasis added).

164. *Carden*, 110 S Ct at 1025.

Southern, and *Bouligny* were not considered by the Court in reaching its determination that each member's citizenship had to be counted for diversity jurisdiction purposes. Obviously, the Court did not find such considerations relevant, because they were not even mentioned in the opinions. As the majority in *Carden* said: "[n]o doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions."¹⁶⁵

The dissent referred to the Court's decision in *Navarro*, stating that the application of the "real party to the controversy" test was there appropriate.¹⁶⁶ By analogy, the dissent claimed that the "real party to the controversy" test applied in *Navarro* should be applied as well to situations involving limited partnerships.¹⁶⁷ However, the majority stated that *Navarro* involved "the distinctive common-law institution of trustees,"¹⁶⁸ and this writer must agree with the majority that an altogether different analysis was called for in *Navarro* that is not relevant to situations involving corporations or unincorporated associations.

The Court in *Navarro* began its analysis by stating that the suit brought by the individual trustees of a business trust "involve[d] neither an association nor a corporation."¹⁶⁹ Immediately, one is alerted that the Court will apply an analysis different from that applicable to corporations and unincorporated associations. The Court, before facing the situation presented involving a business trust, cited with approval the rules governing corporations and unincorporated associations:

Although corporations suing in diversity have long been "deemed" citizens, . . . , unincorporated associations remain mere collections of individuals. When the "persons composing such association" sue in their collective name, they are the parties whose citizenship determines the diversity juris-

165. *Id.* at 1020. Indeed, in *Chapman*, the president of the joint stock company was the lone party able to sue and be sued on behalf of the company. *Chapman*, 129 US at 679. Although this additional power conferred on the president was clearly reflected in the record, and thus distinguished the president from the other members of the company, the Court took no notice of this unequal distribution of power among the members of the company.

166. *Carden*, 110 S Ct at 1026.

167. *Id.* "Like the trust beneficiary in *Navarro*, the limited partner 'can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations.'" *Id.* (quoting *Navarro*, 446 US at 464-65).

168. *Carden*, 110 S Ct at 1020.

169. *Navarro*, 446 US at 462.

diction of a federal court.¹⁷⁰

Despite the dissent's contention in *Carden*, *Navarro* does not call for the application of a "real party to the controversy" test to cases involving unincorporated associations; rather, *Navarro* affirms the majority's holding in *Carden* that all members of an unincorporated association, including limited partnerships, must be considered for purposes of diversity jurisdiction.

Navarro was decided according to a long-established rule that "trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship."¹⁷¹ The *Navarro* opinion is littered with citations to cases involving trusts,¹⁷² giving substance to the assertion that, when it comes to determining whose citizenship is to be counted for purposes of diversity jurisdiction, trusts stand apart from both corporations and unincorporated associations.

More direct evidence that *Navarro* is limited in application only to trusts is the fact that the Court in *Navarro* expressly said as much:

The Court never has analogized express trusts to business entities for purposes of diversity jurisdiction. Even when the Court espoused the view that a corporation lacked citizenship, . . . Mr. Chief Justice Marshall explained that the doctrine had no bearing on the status of trustees.

When [persons suing by a corporate name] are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen . . . who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right.¹⁷³

Even the dissent in *Navarro* found that the majority's opinion had no application to situations involving limited partnerships.¹⁷⁴

The majority's opinion in *Carden* was wholly predictable from

170. *Id.* at 461 (citing *Great Southern*, 177 US at 456).

171. *Navarro*, 446 US at 462. See the discussion of *Navarro* starting at note 131 and accompanying text.

172. *Navarro*, 446 US at 460, 464. See notes 136 and 140, referring to *McNutt v Bland*, 2 How 9, 11 L Ed 159 (1844), and *Bullard v Cisco*, 290 US 179 (1933). Both cases contained situations involving trusts.

Other cases cited in *Navarro* involving trust situations, where legal and equitable title are essentially separated, are *Coal Company v Blatchford*, 11 Wall 172, 20 L Ed 179 (1871); *Bonnafée v Williams*, 3 How 574, 11 L Ed 732 (1845); and *Dodge v Tulleys*, 144 US 451 (1892).

173. *Navarro*, 446 US at 463, n.10 (citing *Deveaux*, 5 Cranch at 91).

174. *Navarro*, 446 US at 475, n.6: "I read the Court's opinion in this case as expressing no view on the diversity of citizenship issue that is presented when one of the parties is a limited partnership." *Id.*

the development of the case law. The Court established an incorporated/unincorporated dichotomy in *Chapman*, involving a joint stock company, and in each subsequent case involving an unincorporated association (*Great Southern* involving a limited partnership association, and *Bouligny* involving an unincorporated labor union), the Court determined that, because of the association's unincorporated status, each member's citizenship was determinative of diversity jurisdiction. Thus, when presented with the situation in *Carden* involving an unincorporated limited partnership, the Court was bound to consider the citizenship of each member of the limited partnership, both limited and general partners.

The case law also shows the development of a different test to be applied in situations involving trusts. The analysis used in *Navarro*, a case which involved an express business trust, cannot be applied to situations involving an unincorporated association.

The effect of the decision in *Carden* is to severely limit a limited partnership's access to federal court. Although *Carden* involved an association containing only one limited partner, limited partnerships do exist where membership contains numerous limited partners. By necessarily determining the citizenship of each limited partner for purposes of diversity jurisdiction, chances are that relief will have to be sought in state court.

The larger the limited partnership, the greater the possibility that the partnership will be precluded from seeking a forum in federal court, unless another basis for federal jurisdiction exists. Advocates of abolishing or restricting diversity jurisdiction will perhaps regard *Carden* as an attempt by the Supreme Court to limit its own diversity jurisdiction. This writer firmly believes, however, that *Carden* was decided strictly according to precedent without regard to the effects on federal dockets, despite suspicions to the contrary expressed by the strong four-justice dissent.¹⁷⁵

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175. *Carden*, 110 S Ct at 1027.

